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No. 02 __

IN THE

Supreme Court of the United States

JANE S. WEAVER, *Pro se*,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do procedures for reviewing Individual Right of Action cases under the Whistleblower Protection Act, 5 U.S.C. § 1221, violate due process?

2. Does public policy forbid enforcing without a hearing a contract of silence obtained as a condition of a whistleblower's transfer?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jane S. Weaver respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit, which affirmed the order of the Merit Systems Protection Board (MSPB) denying that it had jurisdiction over the claims she raised before it.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished, though available electronically at 34 Fed.Appx. 788. It is reproduced in the Appendix at pages 1a-3a. A copy of the order denying petitioner's motion for rehearing or rehearing en banc is at page 4a. The MSPB denied the petition for review in an unreported order reprinted at pages 5a-7a. The Initial Decision of the Administrative Judge (AJ) thereby adopted is

reproduced at pages 8a-28a. The letter from the Office of Special Counsel (OSC) concerning the termination of its investigation is reprinted at page 29a.

JURISDICTION

The Federal Circuit entered its decision in this case on May 14, 2002, and issued an order denying a timely suggestion for rehearing or rehearing en banc on August 8, 2002. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Article III, Section 1 of the United States Constitution provides, in pertinent part:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The First Amendment, in pertinent part, provides, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The pertinent parts of the Fifth Amendment state that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law." Weaver sought relief from the MSPB pursuant to 5 U.S.C. § 1221. That and other pertinent sections of the Whistleblower's Protection Act (WPA) are set forth in Appendix attached hereto, as are relevant MSPB regulations and portions of Rule 6(e) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE[1]

Petitioner Jane S. Weaver was a career attorney employee in the Fraud Section, Criminal Division of the Department Justice (DOJ). Beginning shortly before a meeting of the Attorney General's Advisory Committee in July 1996, Weaver made disclosures up DOJ's chain of command concerning, *inter alia*, misleading statements concerning matters in a recent GAO report and grand jury violations. Supervisors issued retaliatory documentation, removed cases, and assigned Weaver paralegal duties. When Weaver filed an internal appeal, one supervisor delayed the Section's response until immediately after another questioned Weaver about her appeal, then ordered Section employees to perform a warrantless search of Weaver's office, seized government and personal property therein, and also restricted Weaver's access within the office. The Section filed its overdue reply the next day. More non-appealable documentation issued after the Criminal Division denied another component's request for Weaver's services. Weaver received no name-clearing hearing, nor notification of any right to appeal outside DOJ. As a condition for any transfer, officials demanded Weaver's resignation and conversion to a temporary appointment. On June 3, 1997, the day after another office lockout and as a result of a personnel officer's misrepresentations, Weaver signed the proffered agreement. DOJ then failed to fulfill its placement promises, despite requests, and instead terminated Weaver on March 3, 1998.

Weaver first wrote OSC about her internal whistleblowing at DOJ, and the subsequent retaliation, on March 12, 1999. On September 1, 1999, after additional disclosures during the intervening months to the Deputy Attorney General and officials in the U.S. Attorney's Office for the Southern District of Florida, Weaver again notified OSC, this time on

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[1] Based upon documents in the Joint Appendix to the Federal Circuit.

its new form. Her complaint was assigned to the Complaints Examining Unit. On January 11, 2002,Weaver responded to OSC's request for additional documentation. She also requested an OSC subpoena for additional items that possibly implicated grand jury secrecy,[2] but OSC never issued one. Weaver wrote the Special Counsel about DOJ supervisors' suggestion that she become a named plaintiff in the overtime class action lawsuit which mentioned widespread retaliation fears within DOJ. She urged OSC to intervene. Instead, on March 10, 2000, OSC terminated its investigation, and notified her by letter of a right to seek corrective action from the MSPB.

Weaver timely filed with the MSPB, and also filed a RICO/Bivens action under seal in U.S. District Court. Weaver's MSPB package included a motion to seal so that she could discuss her work, an expurgated and condensed report of the retaliation she experienced, and OSC's right-to-sue letter. The assigned Administrative Judge (AJ) repeatedly demanded OSC's closure letter as well. Weaver submitted only the redacted paper materials provided to OSC and cited her statutory right not to submit other documents from OSC. She also proffered that she could not submit the additional electronic material previously given to OSC absent the requested protective order, particularly since the parallel District Court case remained under seal. Meanwhile, DOJ refused Weaver's discovery requests, and the AJ and MSPB refused to allow her to review other files to learn its unpublished rules for whistleblower cases.

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[2] Weaver identified DOJ's stance in *In re Sealed Case No. 99-3091*, 192 F.3d 995 (D.C. Cir. Sept. 7, 1999) to the OSC and AJ as the basis for her subpoena request. Since her internal disclosures, the D.C. Circuit also addressed F.R.Cr.P. 6(e) in *In re Sealed Case*, 121 F.3d 729 (D.C.Cir. June 17, 1997)("presidential communications privilege"), *In re Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. May 5, 1998), *cert. denied* 525 U.S. 820 (1998)(narrow secrecy constr.) and *In re Sealed Case*, 250 F.3d 764 (D.C. Cir. May 11, 2001)(ditto).

The AJ then dismissed Weaver's case for lack of jurisdiction, without any hearing. The Initial Decision interpreted provisions of the agreement Weaver signed as a condition of her transfer as proving voluntariness and removing MSPB jurisdiction over her constructive discharge claim. The AJ also held that Weaver failed to provide evidence establishing jurisdiction under the WPA's IRA provisions, citing her refusal to submit the closure letter and failure to specify sufficiently her protected disclosures. The AJ then dismissed Weaver's requests for a protective order and discovery as moot.

Weaver filed a timely petition for review with the MSPB, which denied it. She appealed to the Federal Circuit, which chose not to hear oral argument. The *per curiam* opinion affirmed the MSPB's lack of jurisdiction because Weaver failed to repeat her DOJ disclosures to OSC and thus failed to exhaust administrative remedies. It also held Weaver improperly relied upon OSC's termination letter to establish jurisdiction under the WPA. The decision further determined that Weaver was not entitled to a hearing on her constructive discharge claim because she had not established that the settlement agreement was involuntary. The opinion failed to mention the AJ's refusals to seal and compel discovery, nor the OSC's refusal to issue the requested subpoena. It concluded simply, by labeling Weaver's remaining constitutional, individual right of action and constructive discharge arguments "unpersuasive." Weaver requested a rehearing or rehearing en banc, but was denied.

REASONS FOR GRANTING THE PETITION

This case offers a unique opportunity to resolve important due process and separation of powers issues inherent in implementation of the Whistleblower's Protection Act of 1989. This Court has never interpreted the statute, despite its applicability to most federal employees. Most *pro se*

petitioners have been unable to formulate the compulsion in the procedures below, address the statute and public policy concerns, or afford litigation.

Exercise of the Court's discretion is also warranted by a circuit split concerning attorney confidentiality and government ethics issues. Indeed, at this very moment, an overtime pay class action lawsuit involving many anonymous DOJ attorney plaintiffs who allege retaliation fears (but not whistleblowing) remains before the U.S. Court of Claims.[3] Their numbers and nationwide practice indicate the importance of disclosure, ethics and retaliation issues, particularly among attorney employees. Exercise of the Court's supervisory power may even be warranted because the integrity of judicial proceedings may be compromised if this executive agency can restrict its attorney employees from judicial fora after reporting misconduct internally.

I. PROCEDURAL DUE PROCESS VIOLATIONS

The Federal Circuit never addressed petitioner's due process arguments. The *per curiam* opinion found that Weaver had not exhausted administrative procedures because she had not repeated her internal DOJ disclosures to the OSC, and stated that her reliance upon the OSC's termination letter to establish MSPB jurisdiction was "without merit." It ignored the subpoena/protective order issues, dismissing her arguments under the Constitution and statutory Individual Right of Action as "unpersuasive."

In fact, the OSC's and MSPB's procedures violate due process because they ignore the statute, as well as this Court's jurisprudence. Both executive agencies utilize performance bonuses, which violate the due process right to an impartial

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[3] *Doe* v. *U.S.*, 44 Fed.Appx. 499 (Fed.Cir. No. 02-5045, unpublished, issued August 7, 2002). Claims Court No. 98-896C selected filings viewable at *www.dojclass.com.*

adjudicator by encouraging quick dismissals. Furthermore, both OSC and MSPB improperly penalized petitioner by dismissing her administrative case after denying her requests for a subpoena and protective order, respectively, which she needed in order to repeat her internal disclosures at DOJ without risking criminal contempt of district courts. Finally, the MSPB has converted statutory *de novo* adjudications into appellate review, thus ignoring the normal judicial practice of evaluating dispositive motions by construing all evidence and drawing all inferences in the light most favorable to the non-moving party. These procedures differ from analogous statutes which this Court has upheld, and thus warrant review.

A. Background—Administrative Procedures

In 1978, Congress comprehensively revised the civil service laws and created the MSPB to handle the adjudicative functions of the former Civil Service Commission. The Office of Special Counsel, within the MSPB, was to protect government employee whistleblowers. A decade later, upon finding few whistleblowers actually protected and widespread fear of retaliation among federal employees (many of whom thus failed to report wrongdoing), Congress passed the Whistleblower Protection Act of 1989. *Inter alia*, the WPA made OSC independent of the MSPB, established a simpler and fairer standard for whistleblowers to prove retaliation by their agencies, and allowed federal employees whose complaints the OSC terminated an Individual Right of Action before the MSPB. Congress also required both OSC and MSPB to seek reauthorization periodically. During the next reauthorization, Congress learned of continued retaliation and narrow interpretations by the Federal Circuit, MSPB and OSC, and so further liberalized the WPA in 1994. Changes

included adding a catch-all prohibited personnel practice and conforming discovery to the Federal Rules of Civil Procedure.[4]

The WPA's administrative investigation schema echoes procedures under the civil rights and labor laws, and involves both bonus-eligible AJs and independence-protected ALJs. The OSC, an investigative and prosecutive agency, receives complaints from current and former government employees and applicants who believe they were retaliated against for speech protected by the WPA. OSC accepts some matters for further investigation, and in others declines to investigate. Whenever the OSC decides not to investigate or to stop investigating, it issues a right-to-sue letter similar to those issued by the EEOC in civil rights cases. OSC also issues another letter which is supposed to discuss the evidence considered and explain its rationale for not acting.

OSC prosecutes prohibited personnel actions before an ALJ assigned by the MSPB.[5] Individuals receiving a no-action letter from the OSC can file a IRA form with the MSPB. The MSPB then assigns an AJ, who issues a form order requiring the employee to prove jurisdiction and the agency to submit its file. Discovery and a hearing may be requested; the AJ ultimately issues an Initial Decision. This resembles the review individuals can receive within the EEOC.[6] Adverse decisions in civil rights matters by both

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[4] Weaver posted relevant sections of the WPA's legislative history cited below, linked at www.peregrinos.us/leghistlink2.htm. This year, Congress addressed retaliation through an alternate route, passing the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002, that President Bush signed on May 15, 2002.

[5] The MSPB's sole remaining ALJ retired in 2001. A press release available at *www.mspb.gov* announced that the MSPB would borrow ALJs from the NLRB or other agencies as necessary.

[6] *See* K. Moss, S. Burris, M. Ullman, M. Johnsen, J. Swanson, *Unfunded Mandate: An Empiral Study of the Implementation of the*

EEOC AJs and MSPB AJs can be appealed to district court where, pursuant to *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the employee receives a *de novo* hearing. District judges also hear civil rights cases prosecuted by the DOJ and EEOC. The losing party in any other matter before an MSPB AJ (including all whistleblowers), has no right to a *de novo* hearing in district court. Such individuals can petition the MSPB for review of the Initial Decision, or appeal directly to the Federal Circuit.

This procedure resembles that under labor and environmental whistleblower statutes, with two important exceptions: (1) the Administrative Procedure Act's protections do not apply to adjudications under the federal personnel laws and (2) the MSPB's AJs are not ALJs. In environmental enforcement cases, for example, employees can appeal OSHA's investigatory terminations to an ALJ at the Department of Labor, and the losing party can appeal to the Appeals Review Board (ARB), whose decisions can be reviewed by the regional Courts of Appeal. The National Labor Relations Board also uses ALJs instead of AJs at the initial decision level, with review available first from the NLRB and then the regional Courts of Appeal.

B. Performance Bonuses Compromise Due Process

In their creative wisdom, the founding fathers included in Article III, Section 1, a requirement that judges' compensation not be reduced during their tenure. Protecting judicial pocketbooks guards judicial independence and integrity. In *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927), Chief Justice Taft recognized that due process required the absence

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Americans with Disabilities Act by the Equal Employment Opportunity Commission, 50 Kansas L.Rev. 1 (2001).

of procedures that might possibly tempt judges to shift the burden of proof or "otherwise lead him not to hold the balance nice, clear and true between the State and the accused."

The MSPB, as an executive agency, chooses to award cash performance bonuses to its AJs each January, based upon factors including the number and speed of their adjudications.[7] AJs are eligible for performance bonuses pursuant to 5 U.S.C. § 4302(b)(4), while full-fledged administrative law judges (ALJs) fall outside the definition of employee in 5 U.S.C. § 4301(2)(D). Because hearings and discovery take time, the performance pay system provides an incentive for AJs to hold fewer hearings, allow less discovery, and instead rely on documentary submissions.[8]

Clearly, the Ohio scheme rejected in *Tumey* was performance-based. That is precisely how it affected judicial impartiality and violated the Constitution's due process requirement. The MSPB's compensation scheme has the same effect—improperly tipping the balance toward the government and against employees alleging reprisal for protected whistleblowing. The logic should be compelling, even if statistical proof for this equal protection/ procedural due process argument is limited by the MSPB's secrecy about its docket and files, quite unlike common law practice and

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[7] H.R. Serial No. 103-19, 103rd Cong., 1st Sess. 47-48, 61 (1993).

[8] The MSPB conceded to the GAO that it found prohibited personnel practices in only 2 of 440 WPA cases in 2000. The Federal Workforce: Observations on Protection from Reprisals for Whistleblowing, GAO 01-715t (May 9, 2001) at p. 6. Tables in Weaver's Federal Circuit brief demonstrated the high dismissal rate for IRAs, and the handful of reversals at the PFR level. Because the MSPB refused Weaver access to other files, she could not determine whether the MSPB denied her PFR as a result of the unpublished requirements hinted at in H.Serial No. 103-19, pp. 32, 43-44.

modern judicial standards.[9] This use of adjudicative titles while rejecting procedural safeguards warrants the Court's attention.

C. Confidentiality Conflicts Among Circuits

The Federal Circuit opinion, in affirming the MSPB's lack of jurisdiction over Weaver's WPA claim, failed to mention the OSC's refusal to issue a subpoena, and the AJ's refusal to issue the requested protective order which would have enabled Weaver to at least submit all the materials proffered to OSC. The Federal Circuit and MSPB thus accorded agency confidentiality concerns undue deference, without balancing petitioner's right to due process, especially as it incorporates her First Amendment right to judicial access, Fourth Amendment right to be free of unreasonable searches and seizures, and Fifth Amendment right against self-incrimination.

Nothing in the WPA statute requires verbatim repetition of the protected whistleblowing disclosures to establish jurisdiction, yet both agencies determined Weaver's extensive but sanitized disclosures insufficient.[10] Both administrative

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[9] The MSPB accords its hearing officers judicial titles, but not the public accountability normally demanded of judges. Outside the very limited docket initiation discovery allowed Weaver, the MSPB has concealed the identity of every AJ whose Initial Decision it has reviewed in a published decision, and also decided not to reveal their employment histories. By contrast, the Federal Judicial Center compiles curriculum vitae of Article I and III judges, published reporters reference the judge below, and the public can inspect judicial records at courthouses absent case-specific protective orders. Finally, unlike the financial disclosure forms of Article I and Article III judges made publicly available through the Office of Government Ethics, those filed by AJs remain secret.

[10] OSC's nonissuance of the subpoena Weaver requested does not indicate that she failed to exhaust administrative remedies, but rather that she *did* exhaust them. Weaver had already provided OSC with significant documentation, including a ten-page, single-spaced timeline and disk of electronic files. She proffered that she had additional documents, but

agencies requested additional information, while also withholding the necessary and reasonable measures Weaver requested to protect herself against self-incrimination, given the confidential criminal investigations inherent both in her job and their requests.

The sanitized materials which Weaver proffered all referred to grand jury secrecy. F.R.Crim.P. 6(e)(3)(C) requires district court authorization for any disclosure outside DOJ, as the MSPB or OSC certainly were. DOJ rejected her request to obtain such order while at the same time advocating jurisdictional dismissal at the MSPB.[11] Thus, Weaver could not repeat verbatim her internal disclosures at DOJ (concerning improper access outside DOJ) without violating prosecutorial ethics and risking criminal prosecution. In fact, DOJ had initiated criminal prosecution and the OSC and MSPB both dismissed the case of a non-lawyer who naively produced 6(e) material in *O'Brien* v. *Office of Independent Counsel*, 79 M.S.P.R. 406, 414 (1998). That the Chief U.S. District Judge for the District of Columbia issued a protective order in the parallel case underscored the need for one before the MSPB, and confirmed Weaver's fear of prosecution should she comply with the OSC examiner's request or the AJ's order.

Demands that petitioner repeat in full her oral and written disclosures without the requested subpoena (by the OSC), and sealing order (by the MSPB), respectively, violated the Fifth Amendment's self-incrimination protection as well as

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requested the administrative subpoena to alleviate her concerns about potentially violating grand jury secrecy. OSC instead chose to notify her of her right to file under 5 U.S.C. § 1221 at the MSPB. Administrative remedies having been exhausted at OSC, adjudication began.

[11] This Court set narrow standards for permissible disclosures in *U.S.* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) and *U.S.* v. *Baggott*, 463 U.S. 476 (1983), rejecting the Solicitor General's position for freer disclosure within DOJ.

procedural due process. This Court has explicitly recognized that an individual "certainly may not be punished for exercising a protected statutory or constitutional right." *U.S.* v. *Goodwin*, 457 U.S. 368, 372 (1982). Where the choice is between the rock and the whirlpool, duress is inherent in the decision to waive one or the other. *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967). The Fifth Amendment protects not only wrongdoers, but also those innocent of wrongdoing who have a reasonable fear of prosecution or may be ensnared by ambiguous circumstances. *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 557-58 (1956). Summary dismissal thereby violates due process of law. *Id.* at p. 559. Moreover, as elucidated in *Konigsburg* v. *State Bar of California*, 353 U.S. 252, 270 (1957), the government cannot draw unfavorable inferences as to a lawyer's truthfulness, candor or moral character based upon a refusal to answer asserting that the U.S. Constitution prohibited the tribunal from making that type of inquiry.

Administrative dismissal necessarily foreclosed the petitioner's property interest in employment. If a district judge abused discretion by using civil disentitlement (forfeiture) to penalize a fugitive in *Degan* v. *U.S.*, 517 U.S. 820 (1996), administrative decisionmakers definitely overreached here by imposing a constitutional dilemma and then penalizing the employee's lawful choice via "jurisdictional" dismissal. The equitable balance against a dismissal sanction should be even stronger where both the employee is exercising statutory and constitutional rights rather than flouting the law, and the decisionmaker can readily issue the requested subpoena or protective order. The potentially larger cash bonuses for speedy dismissals make the decisionmakers' abuse of discretion even more blatant.

Executive agencies cannot use the confidentiality employees protect as a sword against their right to petition the government for redress. To date, no federal court has apparently

denied a requested protective order in any attorney's retaliatory discharge lawsuit.[12] The Third Circuit discussed the attorney-client confidentiality context at length and permitted an attorney's lawsuit concerning her retaliatory discharge to continue with appropriate protective orders in *Kachmar* v. *Sungard Data Systems, Inc.*, 109 F.3d 173, 179-81 (3rd Cir. 1997). Earlier, in *Martin* v. *Lauer*, 686 F.2d 24, 33-34 (D.C. Cir. 1982), the D.C. Circuit had rebuffed DOJ's attempt to restrict two employee attorneys' confidential communications with counsel by citing the privilege. However, DOJ has continued to use confidentiality as a sword. In *Jacobs* v. *Schiffer*, 204 F.3d 259 (D.C. Cir. 2000), the D.C. Circuit awarded attorneys' fees after reaffirming that DOJ's preclearance requirement unjustifiably impeded an attorney's exercise of his First Amendment right to consult confidentially with counsel.

Neither the OSC nor the MSPB nor the Federal Circuit attempted any sort of balancing of the employee's interest in due process and access to the courts against the employer's confidentiality interest, despite the unwarranted dilemma that petitioner pointed out. This inaction in effect adopted the DOJ confidentiality sword position which the D.C. Circuit and Third Circuit rejected. Thus, even if all federal personnel cases must be appealed to the Federal Circuit, there is a conflict among the Circuits concerning confidentiality in attorney lawsuits against employers. The potential impact on the integrity of judicial proceedings from this circuit split warrants this Court's attention.

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[12] Most states allow attorneys to proceed with retaliatory discharge actions, despite their professional ethical duty of client confidentiality. Although all DOJ attorneys must maintain at least one active state bar membership as a condition of employment, neither of the exceptions (Illinois and Texas) is at issue here. *See* 16 A.L.R.5th 239 §§ 3, 4 (1993); 52 A.L.R.5th 405 § 3(b) (1997). Ethical rules generally allow attorneys to reveal client confidences (sometimes pursuant to court order) where necessary to get paid or to defend self against impropriety charges.

D. Improper Deference to OSC Termination

The Federal Circuit also rejected Weaver's appeal by claiming that she improperly set forth the OSC's termination letter as establishing jurisdiction. Weaver in fact requested (and did not receive) the *de novo*, trial type hearing which Congress contemplated in passing the WPA, and which the employee received in the sole WPA case cited, *Yunus v. Dept. of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001).

The MSPB's demands for OSC's closure letter and its own regulations demonstrate how the agency has converted the statutory Individual Right of Action (Title of 5 U.S.C. § 1221) into an "Individual Right of Action Appeal" (5 C.F.R. § 1209.1 *et seq.*), despite other MSPB regulations promising a hearing (5 C.F.R. § 1209.6 (b)) and a statutory addition in 1994 which explicitly allowed discovery (5 U.S.C. § 1221(d)). The MSPB has transformed legislatively expected *de novo* review into quicker appellate review of OSC's decision to terminate its investigation. This Court rejected a similar jurisdictional rationale in the parallel civil rights employment discrimination context in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). There, the absence of EEOC findings of reasonable cause did not bar suit under Title VII in district court. *Id.* at pp. 798-99. The Court refused to graft another requirement to the statute; the EEOC's notice of the right to sue sufficed.

Congress expressly adopted a similar right-to sue scenario in the WPA, and reiterated its intended liberal construction in 1994. In addition to the hortatory preamble (5 U.S.C. § 1201 nt.), the never-removed language from the original 1989 Act specifies that the MSPB should not consider OSC's termination decisions in adjudicating IRAs. 5 U.S.C. § 1221(f)(2). Nonetheless, during the MSPB's 1994 reauthorization, legislators heard that AJs were improperly demanding close-out letters and dismissing matters without

discovery, along with the MSPB's denials.[13] Congress then reinforced its preference for *de novo* review at the MSPB level by adding another subsection, this time to OSC's authorizing statute:

> (B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

5 U.S.C. § 1214(a)(2)(B). Dismissing a case because of a exercise of this statutory right makes consent a pretext, and eviscerates both subsections' language.

Due process also requires that a judge evaluating a dispositive motion construe all facts and inferences in the light most favorable to the non-moving party. Already, by definition, OSC has denied relief to all who receive IRA right-to-sue letters,[14] so the closure letters referenced therein can only become roadmaps for dismissals. A Westlaw search confirmed that the MSPB has never used in any IRA case this familiar formulation used by all federal courts when deciding dispositive motions.[15] Moreover, the MSPB's jurisdictional

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[13] H.R. Rep. No. 769, 103rd Cong., 1st Sess. 12-13, 22 (1994) H. Serial No. 103-19 at pp. 32, 43-44; *Reauthorization of the Office of Special Counsel: Hearing before the Subcomm. on Fed. Services of the Senate Comm. on Post Office and Civil Service* 36-37, 148-49 (1992); S.Rep. No. 416, 102d Cong., 2nd Sess. 6, 9 (1992).

[14] OSC only claimed to have achieved some favorable results in 7% of the whistleblower retaliation complaints closed in FY2000. GAO 01-715t at p. 6. The Federal Circuit brief lists lower historical rates.

[15] Former MSPB Chairman Erdreich, dissenting to a decision dismissing an IRA whistleblower's PFR, referred to construing all facts in the light most favorable to the agency. This tends to indicate other Board member thought agency-favorable formulations proper. *Moeller* v. *Dept. of Veterans Affairs*, 62 M.S.P.R. 361 (1994). MSPB does use the non-moving party formulation—to evaluate agency employer's objections to the OSC's relatively few stay requests.

dismissals mostly occur at the pleading stage, not the post-discovery summary judgment stage. Plus, MSPB almost never uses the judicial "genuine issue of material fact" terminology when determining whether factfinding via a hearing is necessary.[16]

Last term, this Court once again reaffirmed the notice pleading standard which has become a basic judicial due process element. In *Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 505 (2002), it unanimously held that notice pleading in civil matters only requires a plaintiff to submit a short and plain statement of the claim to the defendant before being allowed discovery, not the establishment of a *prima facie* case. *See also National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256 (1994); *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957).

The MSPB has never adopted notice pleading. Congress heard testimony that the MSPB used fact-pleading and non-documented procedures (presumably from the Civil Service Commission, since they predate the Federal Rules of Civil Procedure) to dismiss whistleblower cases.[17] The MSPB never confirmed this, but the scant empirical evidence indicates very few whistleblowers receive hearings. The opinion in petitioner's case included no factfinding. Indeed, that the MSPB often improperly shifted the burden of proof onto employees and away from the government was raised before this Court in *Lindahl* v. *O.P.M.*, 470 U.S. 768, 776 n.9 (1985), but not decided as necessary to the opinion. Finally, the MSPB and OSC normally fail to evaluate items in the record that detract from the weight of the chosen con-

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[16] Only once in a whistleblower IRA (and only in denying a later compliance request), and nine times in nonwhistleblower cases.

[17] H.Serial No. 103-19 at pp. 43-44.

clusion.[18] By refusing to adopt these judicial standards in its jurisdictional dismissals, the MSPB has sacrificed individuals' due process rights.

In *Sims* v. *Apfel*, 530 U.S. 103, 110-112 (2000), this Court refused to ratify an analogous jurisdictional dismissal rationale, namely an issue-exhaustion requirement at the Social Security Administration's nonadversarial administrative level. Like the Social Security process prior to the compensation-neutral ALJ level, the OSC was conceived as nonadversarial. Indeed, after hearing reports that OSC preferred to defend the "merit system" rather than employees claiming retaliation, Congress specifically directed OSC to protect individuals. 5 U.S.C. § 1201 nt. MSPB's issue exhaustion or evidence-preclusion practice—of evaluating, as here, only documents submitted to the OSC and refusing discovery—is thus unwarranted. Plus, OSC's complaints examiners do not act like judges–they hold no hearings and allow complainants no discovery from the agency. OSC's closure letters, like its right-to-sue letters, typically do not specify the evidence reviewed, although they are slightly longer. They deserve no deference because Congress never intended that they have the force of law.

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[18] In addition to not construing even the facts in the ten page retaliation timeline submitted to OSC in the light most favorable to petitioner, the Initial Decision included several factual errors or typos. The Background section referred to "poor performance evaluations" although Weaver's materials said she had received a rating of Excellent the previous year and that the performance rating both as issued and as revised after the additional whistleblowing included retaliatory elements. Also, although Weaver specifically stated that she "would not have signed the agreement if she had known that the agency intended to terminate her tenured employment," the Initial Decision incorrectly characterized her "argument" as that "she may have signed the agreement absent the alleged misrepresentation" followed by a wholly inapplicable "*Id.*" Finally, fn. 4 contained miscalculations, along with a typographical error which increased the purported period of delay by a year.

Thus, under the WPA statute and jurisprudential standards, the MSPB cannot circumvent due process by deferring to the OSC's administrative determinations rather than conduct *de novo*, trial type hearings. The Federal Circuit's silence concerning these bonus, confidentiality and review due process issues does not preclude review. The Court's attention is important because personnel issues throughout the government can only arise through the Federal Circuit.

II. PUBLIC POLICY AGAINST WAIVER ENFORCEMENT

Enforcing the contract of silence here, especially absent any hearing, has important policy implications for whistleblowers throughout the government, for it allows agencies (and by analogy, private employers) to retaliate until an employee capitulates. This disregards not only the WPA's employee-protective goal, but also fundamental public concerns in the First Amendment.

The *per curiam* opinion never mentioned Weaver's public policy arguments, only stated that she had not presented a *prima facie* case that her June 3, 1997 "settlement" and resignation were involuntary, while citing no legal precedent. Instead, the opinion added that Weaver was a licensed attorney and failed to submit evidence showing her inability to understand the nature of the agreement or an uninformed decision to enter into it, although an earlier sentence had noted her coercion and misrepresentation claims. The double negatives concealed the reversed burden of proof in enforcing this waiver of fundamental constitutional rights. In addition to passing over the circumstances of signature, the Federal Circuit, like the MSPB, failed to note: (1) the absence of any litigation to be settled or even notification of a non-agency forum at the time the agency presented the contract as a precondition to any transfer, (2) the only term the agency seeks enforced is the blanket waiver requiring Weaver to

withdraw all appeals or complaints and forbidding all future claims in any forum, and (3) the agency never claimed to fulfill all the contract's other terms.

A. Fundamental Constitutional Concerns

Enforcing the silence provisions and blanket waiver of government access without any hearing undercuts two different lines of First Amendment jurisprudence and ultimately raises separation of powers issues. The fundamental constitutional concerns involved warrant placing the burden of proving voluntariness on the agency seeking to enforce the waiver. Instead, the Federal Circuit opinion requires the employee to prove involuntariness and therefore jurisdiction before any hearing. It apparently condones both the discovery denial and construing facts and inferences to favor the agency as the party questioning jurisdiction, contrary to judicial due process discussed above.

Retaliation offends the Constitution by threatening to inhibit exercise of the protected First Amendment right. *Pickering* v. *Board of Education*, 391 U.S. 563, 574 (1968). As the unanimous Court recognized in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415-16 (1979), a public employee's private expression in a workplace is not beyond constitutional protection. Like Givhan, petitioner chose to express her views privately within the agency, all at a time when the GAO, DOD and DOJ were discussing this program. The speech link is clear because of the agency's contractual demand for petitioner's silence as a condition for any transfer out of the clearly hostile work environment. The agency specifically sought to eliminate all judicial remedy, thus all disclosure of its willful misbalancing of the scales.[19] DOJ therefore demanded an "unconstitutional

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[19] In *Connick* v. *Myers*, 461 U.S. 138, 148 n.8 (1983), the Court, analyzing *Givhan*, suggested that allegations of discrimination by a public employer are "inherently a matter of public concern."

condition" for the receipt of a government-provided benefit. *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972). *See also Lefkowitz* v. *Turley*, 414 U.S. 70, 82-83 (1973)("a waiver secured under the term of substantial economic sanction cannot be termed voluntary").

This past term, the Court analyzed the right to petition the government, which this contract of silence implicates, in two retrospective contexts. In *BE&K Construction Co.* v. *NLRB*, 122 S.Ct. 2390, 2399 (2002), it refused to condone an administrative sanction imposed upon a party losing a judicial case. The opinion analogized to free speech cases and the need for "breathing space protection," because even unsuccessful suits "allow the public airing of disputed facts,""raise matters of public concern" and "add[] legitimacy to the court system as a designated alternative to force." *Id.* at p. 2400. The Court also recognized the implications cover-ups have in impeding backward access to the courts in *Christopher* v. *Harbury*, 122 S.Ct. 2179, 2186 (2002). That opinion involved various non-cognizable and non-remedial claims, but concluded by noting that the plaintiff could still potentially get relief on pending tort claims before the district judge. *Id.* at p. 2190.

The "settlement agreement" here was aimed at speech and barring judicial access and thus relief. Because the agency never notified Weaver of a right to appeal outside DOJ and she had not then involved the court system, the claim cover-up aspect resembles that in *Harbury*. Moreover, unlike that district judge, the MSPB and Federal Circuit denied Weaver all access to necessary discovery from the agency, and all relief. The other retrospective aspect of the MSPB and Federal Circuit position, upholding the waiver without a hearing, is not as overt as the administrative sanctions at issue in *BE &K*. Yet the effect is the same, for both the contract and opinions concealed the disputed facts from the very judicial system whose integrity Weaver had tried to protect.

Furthermore, as fn.8 in the Initial Decision noted, Weaver then "withdrew" her oral complaint to DOJ-IG. This demonstrated only that retaliation worked after the last lockout, since DOJ-IG had already told Weaver it would not investigate. However, the ensuing silence necessarily diminished the protection that independent discussion and judicial access normally accords society.

Executive attempts to aggrandize power at the expense of individuals and of public discourse date to the founding fathers. Chief Justice Marshall twice rebuffed them in public employment cases. In the context of an executive who failed to forward the commission of a magistrate of the opposing political party, he held "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). At the end of his career, Marshall again reined in an executive, this time who tried to eliminate all judicial remedy for a former employee while garnishing private funds for missing public money. *U.S.* v. *Nourse*, 9 Pet. 8, 28-29 (1835).

The issue is whether the executive can be a law onto himself. The *per curiam* opinion's presumption of voluntariness and shifting the burden of proof allows executive agencies to circumvent judicial remedy simply by creating a hostile work environment to force retirements or other constructive discharges and then stonewalling. This contradicts the WPA and Congress' clearly expressed intent. Indeed, the opinion's *prima facie* case language, unaccompanied by citation, conceals both the many voluntariness hearings accorded non-whistleblowers making constructive discharge claims, as well as the lack of discovery and credibility determinations here.

The Court of Appeals' silence may indicate it imposes a heightened pleading requirement in whistleblower cases, despite this Court's teaching in *Crawford-El* v. *Britton*, 523

U.S. 574, 593 (1998). Moreover, in *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 682 (1999), the Court cited *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937), which stated, "courts indulge every reasonable presumption against waiver of fundamental rights." The Federal Circuit has cited that case in published decisions not arising from the MSPB, but chosen the opposite here.

Both the MSPB and Federal Circuit apparently indulged every presumption in favor of waiver (which they prefer to call settlement), despite its implications upon the fundamental constitutional rights of free speech and access to the courts. This case is important because it clearly sets forth the adjudicator's refusal to consider all contract terms and circumstances on the record, as well as because neither the MSPB nor Federal Circuit asked the state to prove it fulfilled its contract terms and had clean hands before approving the waiver. Despite only partial performance, the state wishes to enforce the contract term most against public policy: silence about government misconduct. Attention is warranted because this undercuts public employee speech nationwide.

B. Analogous Non-Waivable Statutes

The Federal Circuit's WPA non-analysis contrasts with the public policies against waiver that this Court has elucidated under analogous statutes, as have responsible regional courts of appeal and executive agencies. The key factor is the disparate bargaining power between an employer and individual employee, which otherwise can encourage disrespect for the policies these protective statutes embody.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 705-08 (1945), the Court refused to give effect to a waiver because such would nullify the purposes of the Fair Labor Standards Act. It noted that the Administrator's limited enforcement powers, and the difficult standard of proof in criminal

matters, otherwise could give employers an incentive to gamble and evade the act, thereby taking advantage of the employees' needs which were the public policy impetus for Congressional passage. *Id.* at pp. 709-10. *See also Hogue* v. *Southern Railway Co.*, 390 U.S. 516, 517 (1968)(Federal Employers' Liability Act); *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972)(National Labor Relations Act). Like those labor administrators, OSC has limited enforcement powers, and a difficult proof standard before the MSPB, which is why it engages in very few retaliation prosecutions. Enforcing waivers would encourage agency employers to flout the WPA's protections and thwart its goal of protecting employees revealing fraud, waste, abuse and gross mismanagement through lawful channels. Thus, the reasons for refusing to give effect to the WPA waiver here are at least as strong as in these labor contexts.

Civil rights statutes implement anti-discrimination policies analogous to the WPA's solicitude for lawful whistleblowers. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), this Court recognized that employees cannot prospectively waive rights under Title VII because such "would defeat the paramount congressional purpose behind Title VII."[20] Indeed, the Federal Circuit's and especially the AJ's opinion in petitioner's case resemble the trial court opinion overruled in *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986). In *Meritor*, this Court determined a hostile work environment claim sufficed to plead sex discrimination, and that the mere existence of an internal grievance procedure failed to insulate the employer from liability. *Id.* at pp. 65-67, 72-73. The Court found that fact that conduct was "voluntary" in the sense of the employee not being forced to participate, was not a defense, because the proper question was whether the

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[20] The Court most recently struck down a waiver in *Oubre* v. *Entergy Operations*, 522 U.S. 422 (1998). The Age Discrimination Employment Act (ADEA) expressly addresses waiver, unlike the WPA.

advances were unwelcome. *Id.* at pp. 68-69. Here, the changed work environment after the internal disclosures was unwelcome, yet adjudicators ignored this, as well as the minuscule power of the individual employee against layers of agency officials.[21]

Indeed, Courts of Appeals other than the Federal Circuit have recognized that employers use their workplace leverage to undercut legislative policies, and refused to enforce such waivers. The D.C. Circuit determined a reemployment offer conditioned upon acceptance of illegal and dangerous conditions "transgresse[d] the clear prohibition" and thus constituted a separate violation of the Mine Safety and Health Act in *Secretary of Labor (ex rel. Keene)* v. *Mullins*, 888 F.2d 1448, 1451-52 (D.C. Cir. 1989). *See also Doyle* v. *Hydro-Nuclear Services, Inc.*, 285 F.3d 243, 251-52 (3d Cir. 2002)(Energy Reorganization Act); [22] *Brooks* v. *Village of Ridgefield Park*, 185 F.3d 130, 136 (3d Cir. 1999)(FLSA); *Connecticut Power & Light* v. *Secr. of Labor*, 85 F.3d 89, 95 (2d Cir. 1996) (Energy Reoganization Act); *Macktal* v. *Secr. of Labor*, 923 F.2d 1150 (5th Cir. 1991)(same).

Enforcing waivers creates an incentive for the employer to choose to ignore the public policy the statute embodies, but instead use bargaining strength (or misrepresentations or additional statutory violations) to secure the waiver. The

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[21] This Court most recently recognized the coercive effects of a hostile work environment in civil rights cases. *National Railroad Passenger Corporation* v. *Morgan*, 122 S.Ct. 2061 (2001); *Haddle* v. *Garrison*, 525 U.S. 121 (1998); *Farragher* v. *City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). Jurisdiction over civil rights cases rests in district courts and regional courts of appeal, after consideration at the agency level by EEOC or OSC pursuant to their letter of understanding.

[22] Noting the Secretary of Labor had deemed the prospective waiver unenforceable, Doyle has filed a petition for certiorari, No. 02-297, which the Solicitor General opposes.

potential for abuse is greatest where the waiver is secured without involving any judge to ensure against overreaching. Thus, MSPB's and Federal Circuit's waiver enforcement in the whistleblower context condones a code of silence that undercuts public policy.

C. Waiver Demand as Violation

Because the Federal Circuit ignored the public policy issues, it never addressed whether DOJ's presentation of the contract of silence constituted a separate statutory violation, as under the labor and environmental statutes above. Because separate violation analysis fulfills the public policy, decision on constitutional grounds may not be necessary.

The WPA's legislative history emphasized the public interest in good government and having civil servants report misconduct. Ample language urges expansive construction. Indeed, the statutory preamble even states its goal as "to prevent reprisals, and to help eliminate wrongdoing within the Government." 5 U.S.C. § 1201 nt. One report expressed dissatisfaction with limited protections under the First Amendment after *Mt. Healthy City Board of Educ.* v. *Doyle*, 429 U.S. 274 (1977).[23] By 1994, Congress realized how creative and pervasive reprisals could be, and how narrow-minded were the MSPB's and Federal Circuit's interpretations.[24] In broadening the WPA, it added a catchall prohibited personnel action, "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2308(a)(2)(ix). This resembles Title VII's language ("terms, conditions, or privileges of employment") which the Court found enabled hostile work environment claims in *Meritor*, 477 U.S. at p. 64. Clearly, the resignation demanded and temporary appointment also significantly changed petitioner's

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[23] H.R. Rep. No. 274, 100th Cong. 1st Sess. 26-27 (1987).

[24] H.R. Rep. No. 769 at pp. 17-18.

duties and responsibilities, and the agency made clear that it would not transfer her out of the hostile work environment absent such.

Furthermore, weeks before DOJ presented this contract to petitioner, unknown to her, the EEOC issued Policy Statement 915.002, which declared that agreements containing waivers of future claims would be investigated as additional violations of the antidiscrimination laws. Under this rationale, presenting this agreement with both prospective and retrospective waivers was a separate WPA violation.

Enforcing whistleblower waivers against government attorney employees in summary administrative proceedings also raises serious separation of powers issues, for such attorneys are officers of the court as well as executive branch employees. Thus, the Executive would not only be usurping a judicial function administratively, but also potentially undercutting the integrity of judicial proceedings. Indeed, the D.C. Circuit put even civil attorneys employed by the government on notice that they should abide by this Court's command to prosecutors that they "do justice, rather than win cases." *Freeport-McMoran Oil & Gas Company, Inc.* v. *F.E.R.C.*, 962 F.2d 45, 46 (D.C. Cir. 1992), *citing Berger* v. *United States*, 295 U.S. 78, 88 (1935). Plus, where courts do not hear about protective order violations or disregarded case law (such as *Martin* v. *Lauer*, *supra*), they are deprived of their ability to exercise supervisory power over their own proceedings. The Fourth Circuit amply documented that power in *U.S.* v. *Shaffer Equipment*, 11 F.3d 450, 457-58 (4th Cir. 1993). The Federal Circuit has issued no comparable reaffirmation of government employee ethics.

The public interest in the integrity of DOJ attorneys warrants this Court's attention. By not publishing their decisions in this case, the Federal Circuit and MSPB have condoned these contracts and thus retaliation in the whistleblower context. Many DOJ attorney employees have

anonymously joined the Court of Claims overtime class action lawsuit and cited retaliatory fears even without whistleblowing. The administrative agencies below ignored those retaliation allegations. Petitioner's circumstances provide an important vehicle not only for the vindication of her individual rights, but also of judicial processes in the separation of powers context.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-3315

JANE S. WEAVER,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Decided: May 14, 2002

Before MAYER, *Chief Judge*, NEWMAN and CLEVENGER, *Circuit Judges*.

PER CURIAM.

Jane S. Weaver seeks review of the decision of the Merit Systems Protection Board, No. DC 1221000535W-1 (May 14, 2001), dismissing her individual right of action ("IRA") appeal for lack of jurisdiction. We *affirm*.

Weaver was employed as a trial attorney at the Department of Justice ("DOJ"). In June of 1997, she entered into a settlement agreement with DOJ resolving disputed issues over her placement in a performance improvement program and denial of a within-grade increase. Pursuant to the terms of the settlement agreement, Weaver resigned, and later was given a temporary appointment in the U.S. Attorneys Office for a set period. After the expiration of the set period, she was placed on administrative leave for ninety-days and then

separated from federal service effective March 2, 1998. In September of 1999, Weaver filed a complaint with the Office of Special Counsel ("OSC") alleging that DOJ had retaliated against her for disclosing fraud, waste, and mismanagement. OSC informed her that it had terminated its inquiry into her allegations and would take no further action. Weaver appealed to the board.

We must affirm the final decision of the board unless we determine that it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000).

We review the board's decision regarding its own jurisdiction de *novo*. *King v. Briggs*, 83 F.3d 1384, 1387 (Fed. Cir. 1996). The board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes "non-frivolous allegations" that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and the disclosure was a contributing factor in the agencys decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Yunus v. Dept of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

Weaver asserts that the board has jurisdiction over her IRA appeal because several DOJ components and other federal agencies refused to hire her because of her whistleblowing activity. By refusing to disclose the basis for her alleged whistleblowing to OSC, however, Weaver failed to exhaust her administrative remedies because she rendered it impossible for OSC to take action. And her reliance on OSCs termination of investigation letter to establish board jurisdiction is without merit.

Weaver also asserts that the board erred by not affording her a hearing on the voluntariness of her resignation. She contends that her settlement agreement with DOJ is invalid because her signature was obtained through coercion and misrepresentation. Weaver did not present a *prima facie* case that her June 3, 1997, settlement and resignation were involuntary. Moreover, Weaver, a licensed attorney, submitted no evidence showing that she was unable to understand the nature of the agreement or that her decision to enter into the agreement was uninformed.

We have considered the remainder of Weaver's individual right of action, constructive discharge, and constitutional arguments and find them unpersuasive.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-3315

JANE S. WEAVER,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ORDER

A combined petition for panel rehearing and tor rehearing en banc having been filed by the PETITIONER, and a response thereto having been invited by the court and filed by the RESPONDENT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 15, 2002.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY Clerk

Dated: August 8, 2002

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DC-122 1-00-0535-W-1

JANE S. WEAVER,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

Date: May 14, 2001

Jane S. Weaver, Arlington, Virginia, *pro se*.

Timothy Zick, Esquire, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The

regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115(5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Boards final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that

gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s/ Robert E. Taylor
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
DC-1221-00-0535-W-1

JANE S. WEAVER,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: July 6, 2000

Jane S. Weaver, Arlington, Virginia, pro se.

Timothy Zick, Esquire, Washington, DC, for the agency.

BEFORE
Sherry A. Armstrong
Administrative Judge

INITIAL DECISION

On May 21, 2000, the appellant filed an individual right of action (IRA) appeal alleging that she had been constructively removed and that the agency had taken several other actions which she asserted were due to reprisal for alleged whistleblowing activity. For the reasons set forth below, the appeal is DISMISSED.

BACKGROUND

The appellant was employed in the position of Trial Attorney, GS-0905-13, in the Fraud Section of the Criminal Division at the U.S. Department of Justice (DOJ or agency) in Washington, D.C. Agency File (Ag. File), Tab 4A. On December 3, 1996, an attorney representing the appellant at that time, Michael J. Kator, Esq., informed the agency that he was representing the appellant in regard to "employment issues" including the appellant's placement in a performance improvement program and her denial of a within-grade increase. Ag. File, Tab 4P. The parties immediately began negotiating a settlement agreement. Ag. File, Tabs 4L through 40. The appellant subsequently terminated her relationship with Mr. Kator on June 2, 1997. Ag. File, Tab 4J. Nonetheless, on June 3, 1997, she entered into a settlement agreement with the agency resolving the disputed issues. Ag. File, Tab 4H. Pursuant to the terms of the settlement agreement, the appellant resigned her employment with the agency. Ag. File, Tabs 4H and 4I. She was then given, *inter alia*, a temporary appointment and was detailed to the U.S. Attorney's Office for a set period. Ag. File, Tab 4H. The detail was not extended and, pursuant to the terms of the settlement agreement, the appellant was placed in administrative leave status for a 90-day period and was subsequently separated from Federal service effective March 2, 1998, and pursuant to the terms of the settlement agreement. Ag. File, Tabs 4A, 4H, and 4I.

On or about September 1, 1999, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency had retaliated against her for disclosing fraud, waste, and mismanagement within the agency. Appeal File (AF), Tabs 9 and 11. On March 10, 2000, OSC informed the appellant that it had terminated its inquiry into her allegations and would take no further action. AF, Tab 1. OSC advised the appellant that she may have the right to seek corrective action from the Board. *Id.*

On May 21, 2000, the appellant filed an appeal with the Board summarily alleging that she had been subjected to reprisal for protected activity based on an alleged involuntary resignation and other agency actions. *Id.* By orders dated May 22, 2000, and June 6, 2000, the appellant was provided information regarding the burdens of proof applicable to both an appeal of a constructive removal and for an Individual Right of Action (IRA) appeal. AF, Tabs 2 and 4. By motion dated June 6, 2000, the agency advised the Board that the appellant had resigned pursuant to a settlement agreement. AF, Tab 5. Accordingly, by order dated June 7, 2000, the appellant was advised of the burden of proof applicable to a parties' attempt to set aside a settlement agreement. AF, Tab 6.

The appellant filed several responses to the Board's orders and her responses have been fully considered. AF, Tabs 3, 9, 11, and 13. In general, she asserted that she made protected disclosures which resulted in several personnel actions including, inter alia, constructive removal, threats of an adverse action, denial of a detail, denial of a step increase, poor performance evaluations, a reprimand, implementation of a performance improvement plan (PIP), removal of work assignments, assignment of work duties normally performed by subordinate employees, removal of a computer, limited agency access, and failure to hire by other DOJ departments and federal agencies. AF, Tabs 1, 3 and 9. Because it could not be determined from her two initial submissions whether she had fulfilled the statutory requirement that she exhaust remedies through OSC before filing an IRA appeal with the Board, the appellant was again informed of that requirement and was ordered to submit additional documentation. AF, Tab 10. The agency subsequently filed a motion to dismiss this appeal for lack of jurisdiction. AF, Tab 12. The appellant filed an objection to that motion. AF, Tab 13.

ANALYSIS AND FINDINGS

The existence of Board jurisdiction is a threshold issue in adjudicating an appeal, and the appellant bears the burden of establishing jurisdiction by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(i). *See Covington v. Department of the Army*, 85 M.S.P.R. 612, 618 (2000). In order to obtain a hearing on a jurisdictional issue, the United States Court of Appeals for the Federal Circuit and the Board have held that an appellant is required to make a nonfrivolous allegation of jurisdiction. *See Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed.Cir.19S6); *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed.Cir.1985); *Schmidt v. U.S. Postal Service*, 39 M.S.P.R. 188, 192 (1988). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter in issue. *See Dumas*, 789 F.2d at 894. In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, an administrative judge may consider an agency's documentary submissions. *See Dumas*, 789 F.2d at 894; *Manning*, 742 F.2d at 1428; *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). However, to the extent that the agency's evidence constitutes mere factual contradiction of an appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties. *Id.*

The appellant has not presented a prima facie case that the settlement agreement is invalid.

As noted above, on June 3, 1997, the appellant entered into a settlement agreement with the agency. Ag. File, Tab 4H. The agreement provided, *inter alia*, as follows:

> Ms. Weaver agrees to withdraw all appeals or complaints against the U.S. Department of Justice or any

> Department of Justice employees pending in any forum including, but not limited to the EEOC, MSPB, FLRA, the Office of Special Counsel, Federal court, state court, arbitrators, or grievance procedures. Ms. Weaver further agrees not to file any claims in any forum, including but not limited to EEOC, MSPB, the Office of Special Counsel, arbitrators or courts, against the Department of Justice or its employees (other than an action to enforce this agreement) that arose out of her employment with the Department of Justice up to the date of this agreement. Ms. Weaver also agrees not to claim before the EEOC, MSPB, the Office of Special Counsel, arbitrators and courts, that the Agency engaged in any illegal or improper conduct (including but not limited to prohibited personnel practices or employment discrimination) involving Ms. Weaver up to the date of this agreement. Ms. Weaver agrees to withdraw any such claim that she may have already filed in any such forum.

Ag. File, Tab 4H, Paragraph 10.

With the exception of claims regarding employment references or failure to hire by DOJ departments or other Federal agencies, it is clear that the remainder of the alleged agency actions challenged by the appellant did, in fact, arise out of her employment with the agency up to the date of the agreement. Moreover, with the same exception, it is clear that the appellant is attempting to assert before the Board, as she did before OSC, that the agency engaged in illegal or improper conduct, including prohibited personnel practices, which involve circumstances occurring up to the date of the agreement. However, the terms of the agreement, as quoted above, clearly provides that the appellant waived appeal rights in any forum, including OSC and the Board, for such actions. *Id.*

The Board has the authority to consider a settlement agreement that the parties entered into in proceedings not

before the Board so as to determine its effect on a personnel action before the Board. *See Covington*, 85 M.S.P.R. at 618-19. *See also, e.g., Sullivan v. Department of Veterans Affairs*, 79 M.S.P.R. 81, 84 (1998) (settlement of an EEOC complaint); *Laity v. Department of Veterans Affairs*, 61 M.S.P.R. 256, 261 (1994) (settlement of a grievance). However, to the extent that the appellant is attempting to repudiate the settlement agreement, I note that the Board has no authority to enforce or invalidate a settlement agreement that has not been incorporated into the record of a Board appeal of an action over which the Board has jurisdiction. *See Kreusch v. U.S. Postal Service*, 85 M.S.P.R. 125, 127 (2000); *Diamond v. U.S. Postal Service*, 51 M.S.P.R. 448, 450 (1991), *aff'd*, 972 F.2d 1353 (Fed.Cir.1992) (Table). The Board, however, may examine the circumstances surrounding the settlement agreement in considering whether it was coerced and, accordingly, whether the waiver of appeal rights should be enforced. *See Danelishen v. U.S. Postal Service*, 43 M.S.P.R. 376, 380 (1990).

The Board and the Federal Circuit have long held that, where an appellant specifically and unambiguously waives their appeal rights in a settlement agreement, it is enforceable and not against public policy if the terms of the waiver are comprehensive, freely made, and fair, and the execution of the waiver was not the result of duress or bad faith on the part of the agency. *See, e.g., McCall v. U.S. Postal Service*, 839 F.2d 664, 666-67 (Fed.Cir.1988); *See Laity*, 61 M.S.P.R. at 261-62; *Merriweather v. Department of Transportation*, 59 M.S.P.R. 434, 437 (1993). Further, if a settlement agreement provides that it fully resolves any and all matters related to employment up to the date of the agreement, as is the case here, then the agreement is binding over all issues which were actually addressed by the agreement as well as those related in any way to the appellant's employment. *Id.* at 263. In *Laity*, the Board held that "[p]articularly since the whistle-blower reprisal claim could have been raised in the grievance,

it is reasonable to infer that such a claim, at a minimum, was among the matters and issues contemplated by the parties in agreeing to waive 'any and all' matters and issues." *Id.* Thus, in this case, if the settlement agreement is valid, it appears clear that the appellant has waived her right to appeal any actions which could have been brought against the agency up to execution of the settlement agreement.

It is well settled that a party attacking a settlement agreement bears a heavy burden to showing that the contract she made is tainted with invalidity, either by fraud practiced upon her or by a mutual mistake under which both parties acted. *See Asberry v. U.S. Postal Service*, 692 F.2d 1378, 1380 (Fed.Cir.1982; *Dickson v. General Services Administration*, 85 M.S.P.R. 7, 10 (1999); *Cassidy v. U.S. Postal Service*, 65 M.S.P.R. 86, 90 (1994); *Hazlett v. Department of Justice*, 25 M.S.P.R. 623, 625 (1985). The appellant was advised of the burden of proof applicable to setting aside a settlement agreement and was provided the opportunity to show cause why the settlement agreement should not be enforced. AF, Tab 6.

In her response, the appellant cited several court cases as well as the Restatement of Contracts (Second) supporting her assertion that contracts tainted by mistake, duress, or fraud are voidable at the option of the innocent party. AF, Tab 9, citing *Oubre v. Entergy Operations*, 522 U.S. 422, 427 (1998), and *T Brown Construction, Inc. v. Pena*, 132 F.3d 724, 729 (1997). However, these cases merely restate the Board law. The principles contained there are not challenged. Nonetheless, it remains the appellant's burden to establish that such mistake, fraud, or duress occurred.

In her response, as grounds for showing the settlement agreement to be invalid, the appellant stated that she was not represented at the time she executed the agreement. AF, Tab 9. However, lack of representation does not establish that a settlement agreement was coerced. *See Wade v. Department*

of Veterans Affairs, 61 M.S.P.R. 580, 584 (1994). The Board has held that parties to a settlement agreement are presumed to have full legal capacity to contract unless they are under guardianship, an infant, mentally ill or defective, or intoxicated. *Id. See also Ray v. Department of Health & Human Services*, 57 M.S.P.R. 16, 20 (1993). The appellant, a licensed attorney, does not assert that she lacked full legal capacity to enter into the settlement agreement nor has she submitted any evidence showing that she was unable to understand the nature of the settlement agreement or that her decision was not an informed one. *See Wade*, 61 M.S.P.R. at 584; *Riley v. Department of the Army*, 55 M.S.P.R. 671, 677 (1992). Moreover, the appellant was represented by an attorney until one day prior to execution of the settlement agreement.[1] Ag. File, Tab 4F. Several drafts were prepared by the agency and appellant's former counsel over a period of about four months. Ag. File, Tabs 4H, 4L, 4M, 4Q. The draft agreements, found at Ag. File, Tabs 4L, 4M, and 4O, are very similar in language to the final agreement. Ag. File, Tab 4H. Thus, it is clear that the appellant was represented for the bulk of the settlement negotiations which occurred over a four month period. Consequently, it appears that the settlement agreement was carefully negotiated between the appellant or her chosen representative and the agency and, thus, there is no indication from this evidence that the settlement agreement was involuntary.[2] *See, e.g., Frizzell v. Department of the*

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[1] I note that the letter dismissing appellant's counsel is dated June 2, 1996. Ag. File, Tab 4J. The year, 1996, is clearly a typographical error as the other evidence of record clearly indicates that Michael Kator, appellant's counsel, was engaged in representation up until June 2, 1997. *See, e.g.*, Ag. File, Tabs 4L through 4Q.

[2] Further, although the appellant asserts that her attorney demonstrated "negligence and malfeasance" in his representation, AF, Tab 13, an appellant is bound by the actions of their freely chosen representative. *See Covey v. Department of the Air Force*, 53 M.S.P.R. 367, 372 (1992); *Randolph v. Office of Personnel Management*, 33 M.S.P.R. 323, 325

Air Force, 53 M.S.P.R. 413, 415 (1992) (Board found no merit to appellant's argument that he had insufficient time to consider agreement where settlement negotiations occurred over a period of approximately one month); *Office of Special Counsel v. Jennings*, 44 M.S.P.R. 1, 4 (1990) (lack of coercion found where agreement was negotiated over approximately a two month period provided the appellant with adequate time to determine the impact of the agreement on his career or to request additional time to do so).

The appellant also stated that she relied on an agency official's multiple oral and written misrepresentations when she signed the agreement. AF, Tabs 9 and 13. However, the appellant identified only one alleged oral misrepresentation. She asserted that Sandra Bright, an agency official, promised her that she would secure permanent employment for the appellant within the agency if she would sign the agreement. AF, Tab 9, at Timeline, Page 8, and AF, Tab 13. This alleged misrepresentation would not be reviewable by the Board. The appellant does not dispute that the language of the agreement is clear on the issue of her continued employment with the agency. There is nothing in the agreement guaranteeing the appellant a position with the agency and, in fact, the agreement clearly specifies that the appellant would be given a temporary appointment, not to exceed 410 days, which "cannot and will not be extended for any reason." Ag. File, Tab 4H, Paragraph 2. It further provides that the appellant would be detailed to a position in the U.S. Attorney's Office which may be terminated at any time. *Id.* at Paragraph 3 and 4. Should the detail be terminated, the agreement clearly provides that the appellant would be returned to a position in the criminal division for a period of 90 days from the termination of the detail if terminated in six months or less, or

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(1988). Nonetheless, in this case, the appellant signed the agreement after terminating her attorney-client relationship and, thus, is solely responsible for her actions.

for a period of 45 days if the detail is terminated after more than six months. Id. at Paragraph 4. The agreement further states that:

> [a]t the end of 90 or 45 days, whichever applies, the temporary appointment will end and Ms. Weaver will be separated from the Federal Service. It is agreed that such a separation may not be appealed by Ms. Weaver in any forum for any reason. Upon the termination of the detail, the Agency shall use its best efforts to place Ms. Weaver in a position within the Criminal Division or else in the Department of Justice, where she will have a legitimate opportunity to prove herself and secure continued employment.

Id. Based on all the provisions cited herein, the agreement's language is clear that the appellant expressly would not be provided continued employment with the agency. *Id.* There is no ambiguity on this issue. It is well-settled that, in interpreting a settlement agreement, where the terms of an agreement are unambiguous, the intent of the parties is determined from the plain words of the agreement and parole evidence is not considered. *See Amos v. U.S. Postal Service*, 84 M.S.P.R. 186, 189 fn. 2 (1999); *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed..Cir.1988). Consequently, the appellant's parole evidence and argument that she may have signed the agreement despite this alleged misrepresentation by an agency official would not be admissible before the Board. *Id.*

Relying on *Covington*, the appellant argues that the settlement agreement is invalid because she was accused of no misconduct or malfeasance prior to her alleged whistleblowing and thus could not have been removed.[3] AF,

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[3] In *Covington*, the Board held that, where an appellant raises a nonfrivolous factual issue of compliance with a settlement agreement which contains a waiver of appeal rights, the Board must resolve that issue before addressing the scope and applicability of a waiver of appeal

Tab 9. The Board and the courts have long held that an appellant may demonstrate that a settlement agreement was coerced, and thus, involuntary, by showing that the agency threatened to take a future disciplinary action that it knew or should have known could not be substantiated. *See Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed.Cir.1987); *Fassett v. U.S. Postal Service*, 85 M.S.P.R. 677, 679 (2000). Such is not the case here. There was no proposed adverse action and, in fact, the appellant initially hired an attorney to address many issues with the agency, including, inter alia, a reprimand and negative performance appraisal. The settlement agreement resolved those issues to the appellant's benefit.

I note that the signed agreement provides that it was freely and voluntary executed by the parties. Ag. File, Tab 4H. Further, although the appellant alleges that she received no consideration for executing the agreement, her representation is simply erroneous. AF, Tab 13. Pursuant to the agreement, the agency, *inter alia*, withdrew a negative performance appraisal and agreed not to conduct any appraisals for a certain period where the appellant's performance was disputed such that her rating for the period would be "presumptively fully successful." *Id.* at Paragraph 5. The

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rights in the agreement. *See Covington*, 85 M.S.P.R. at 620, *citing McCall*, 839 F.2d at 667-68. In this case, the appellant has made no specific arguments that the agency failed to comply with the agreement but, rather, she asserts that it should not be enforced because it was coerced. I note that there was a sentence in an attachment to the appellant's response which did assert that DOJ failed to comply with the agreement. It was contained in a letter from the appellant to OSC, dated February 9, 2000, in which the appellant summarily stated that the agency failed to comply with the agreement. AF, Tab 9. However, this summary statement is insufficient and the appellant has failed to provide any nonfrivolous allegations supported by facts which, if proven, would form the basis for Board jurisdiction over this appeal. *See, e.g., Langston v. Department of the Army*, 84 M.S.P.R. 597, 600-60 1 (1999) (bare allegations are insufficient to establish noncompliance with settlement agreement).

agency granted the appellant a within-grade increase and agreed to expunge a reprimand and other negative material in her Official Personnel File related to denial of a within-grade increase, placement on a PIP, and an unsatisfactory performance appraisal. *Id.* at Paragraphs 6 and 7. In addition, pursuant to the agreement, the agency paid $6000 to the appellant's attorney. *Id.* at Paragraph 11. See also Ag. File, Tab 4D. The appellant apparently accepted these and other benefits of the settlement agreement immediately upon execution but she made no attempt to set aside the settlement agreement as involuntary until filing a complaint with OSC on or about September 1, 1999—more than two years and two months after execution of the settlement agreement.[4] AF, Tabs 9 and 11. *See Biberstine v. Department of Defense Dependents Schools*, 37 M.S.P.R. 248 (1988) (appellant's failure to raise claims of coercion until almost two months after execution of settlement agreement detracts from "credibility and plausibility" of his argument that he was coerced into settlement); *Lang v. U.S. Department of Agriculture*, 35 M.S.P.R. 314 (1987). These undisputed facts all belie the appellant's assertions that the settlement agreement was involuntary.

Finally, I note that the appellant provided many examples of alleged harassment occurring during her tenure at the agency. AF, Tabs 1, 3, 9, 11, and 13. However, they all relate to the term of her employment and not to the circumstances

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[4] The appellant asserts that she did contact the agency in December of 1997 and in January of 1998 regarding their efforts to comply with the agreement. AF, Tab 13. She also asserts that she contacted her former attorney in March of 1998 and the unemployment compensation offices in Virginia and the District of Columbia in April of 1998. *Id.* However, the appellant still made no efforts to contest the settlement agreement as involuntary until September of 1999. Moreover, even if her contacts with the agency in December of 1998 were indicative of efforts to set aside the agreement, these contacts still occurred more than one and one-half years after execution of the settlement agreement.

surrounding the settlement agreement. *See Landreville v. Department of Health & Human Services*, 63 M.S.P.R. 282, 284 (1994) (allegations of harassment which do not relate to negotiation of the settlement agreement do not provide evidence of coercion).

For all of the reasons cited above, despite the appellant's conclusory allegations that the settlement agreement is invalid because it was the result of misrepresentation, fraud, or duress, the appellant has presented no facts which, if proven, would establish that the settlement agreement was involuntary. Accordingly, the waiver of appeal rights contained therein should be given full effect. Thus, I find that the appellant waived any appeal rights to the Board in the settlement agreement and thus the Board lacks jurisdiction to review any allegations concerning employment issues which could have been brought prior to the date of the agreement.

The Board lacks jurisdiction over the appellant's allegations of constructive removal.

The appellant alleges that some retaliatory actions were taken after execution of the settlement agreement. With the exception of the issue of her constructive removal, the remainder of those allegations will be addressed below. However, in regard to her allegations of constructive removal, it is accurate that the appellant's separation from Federal service occurred on March 2, 1998, after execution of the settlement agreement in June of 1997. Ag. File, Tab 4A and 4H. Generally, an employee-initiated action, such as a resignation, is presumed to be voluntary unless the appellant presents sufficient evidence to establish that the action was obtained through duress or coercion or shows that a reasonable person would have been misled by the agency. *Id. See also Koop v. Federal Emergency Management Agency*, 16 M.S.P.R. 605, 607 (1983). In this case, however, the appellant's resignation was tendered on the date that the settlement agreement was signed. Ag. File, Tab 4I. The

resignation was offered pursuant to the terms of the settlement agreement which, as discussed above, provided that the appellant waived appeal rights in all other forums. Ag. File, Tab 4H. The appellant's subsequent termination following cessation of the detail discussed above was also taken pursuant to the terms of the settlement agreement. *Id.* As discussed at length above, the appellant has not made a prima facie case that the settlement agreement with its included waiver provisions should he set aside as invalid. Accordingly, the issue of alleged constructive removal is not within the Board's jurisdiction.

Assuming, *arguendo*, that the Board's jurisdiction over this issue is not foreclosed by the settlement agreement, it could also not be considered in an IRA appeal. As the appellant was advised, AF, Tab 4, IRA jurisdiction attaches, *inter alia*, when the agency took or failed to take, or threatened to take or fail to take, a "personnel action" listed at 5 U.S.C. § 2302(a)(2)(A). *See Shelley*, 75 M.S.P.R. at 413-14; *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994); *Zimmerman v. Department of Housing & Urban Development*, 61 M.S.P.R. 75, 83 (1994); *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 446 (1991). However, the Board has previously held that a voluntary resignation is not a "personnel action" as defined in section 2302(b)(8) and, thus, that such an appeal is not within the Board's IRA authority. *See Shelley v. Department of Transportation*, 75 M.S.P.R. 411, 413-14 (1997). Consequently, the constructive removal allegation is not within the Board's jurisdiction as an IRA appeal. *Id. See also* 5 U.S.C. § 2302(a)(2)(A).

The appellant has failed to establish that the Board has jurisdiction over an IRA appeal.

As noted above, the appellant alleges that other purported personnel actions occurred subsequent to execution of the settlement agreement. In particular, she asserts that other departments within the Department of Justice as well as other

Federal agencies rejected her employment applications and, thus, she implies that the agency must be providing information which is contributing to her inability to secure Federal employment.[5] AF, Tab 3. The appellant also asserts that agency departments and other Federal agencies failed to hire her due to her whistleblowing activity. *Id.* For the reasons discussed below, these allegations are not within the Board's jurisdiction as an IRA appeal.

An employee may file an IRA appeal to the Board from an agency personnel action alleged to have been proposed, taken, or not taken because of whistleblowing activities. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2. In order to establish Board jurisdiction over an IRA appeal, an appellant must show that she engaged in whistleblowing activity, that she was subjected to a "personnel action" as defined at 5 U.S.C. § 2302(a)(2)(A), and that she engaged in protected activity, raised a specific claim of reprisal regarding the alleged actions to the OSC and that proceedings before OSC have been exhausted. *See White v. Department of the Air Force*, 63 M.S.P.R. 90, 94 (1994); *Geyer*, 63 M.S.P.R. at 13. To establish that the appellant had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), she need not prove that the condition disclosed actually established gross mismanagement, or violations of law, rule and regulation as detailed under 5 U.S.C. § 2302(b)(8)(A)(ii); rather, the appellant must show that the matter disclosed was one which a reasonable person in her position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *See Geyer*, 63 M.S.P.R. at 17.

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[5] The appellant appeared to imply that she may bring actions against other Federal agencies for their failure to hire her which she contends is based on her whistleblowing activity. AF, Tab 9. However, the appellant has filed no Board appeals against any agency other than the Department of Justice.

First, in regard to the appellant's inference that the agency is providing negative information to other agency departments and other Federal agencies such that the appellant has not been appointed to a Federal position, I note that the appellant has presented nothing more than bare allegations that the agency is providing such information to other agency offices and Federal agencies. The appellant provides no facts which, if proven, would establish that the agency's alleged actions occurred. *See Godfrey v. Department of the Air Force*, 45 M.S.P.R. 293, 303 (1990) (an IRA appeal must be based on a threatened, proposed, or not-taken "personnel action," and not based solely on generalized assertions and fears unsupported by reference to any specific action). The appellant relies only on the fact that she has been unable to obtain Federal employment. In addition, the appellant indicated in several instances that disclosures regarding her whistleblowing activity to a prospective employer were made by the appellant herself. AF, Tabs 3 and 9. Further, the appellant has identified no authority on which to find that a negative employment reference or negative information provided to other departments or agencies is a "personnel action" as defined by 5 U.S.C. § 2302(a)(2)(A).

I note that the statutory definition of a "personnel action" does include actions involving an "appointment." 5 U.S.C. § 2302(a)(2)(A)(i). Consequently, the agency's alleged failure to hire the appellant for Federal employment due to protected activity would be a protected personnel action. However, as discussed below, the appellant has failed to satisfy the exhaustion requirement for an IRA appeal.

As cited above, the appellant must establish that she raised a specific claim of reprisal regarding the alleged actions to OSC and that proceedings before OSC have been exhausted. 5 U.S.C. § 1214(a)(3). *See White*, 63 M.S.P.R. at 94; *Geyer*, 63 M.S.P.R. at 1617. The appellant was advised of this requirement in multiple orders. AF, Tabs 4, 6, and 10. The

Board has held that the administrative judge is required to determine whether an appellant fulfilled the exhaustion requirement.[6] *See Costin v. Department of Health & Human Services*, 64 M.S.P.R. 517 (1994).

The appellant continually asserted that issuance of OSC's termination letter, advising her that she may have Board appeal rights, was sufficient to establish the Board's jurisdiction. AF, Tabs 9, 11, 13. That is simply erroneous. OSC stated only that appeal rights may exist with the Board and did not affirmatively grant such rights nor would OSC have the authority to do so. AF, Tab 1. The Board must independently resolve the issue of its jurisdiction over any and every case individually. The requirements for jurisdiction over an IRA appeal is set by Congress and, accordingly, the Board must ensure that they are met.

The appellant did not identify the disclosures at issue in her initial appeal but reserved the right to do so at a later time. AF, Tab 1. After several orders regarding the exhaustion requirement, the appellant did provide a copy of her OSC

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[6] I note for the record that the appellant refused to provide OSC's closure letter based on her interpretation of 5 U.S.C. § 1214(a)(2)(B). AF, Tabs 9 and 11. As I informed her, the Board had earlier held that, because it was required to by Congress to determine whether an appellant had exhausted her remedies before OSC with respect to whistleblowing claims, the Board would consider OSC's letter merely to assist in its determination regarding the exhaustion requirement but not as evidence of whistleblowing as prohibited by statute. AF, Tab 10. The appellant was ordered to submit the closure letter and she failed to comply with this order based on her assertion that, because the Whistleblower Protection Act had been amended in 1994, caselaw decided prior to the amendments was invalid. AF, Tab 11. The appellant's basis for her refusal to comply with a Board order was unfounded. Unless an amendment specifically changed the provision of the law in question, it is simply erroneous to suggest that an amendment of part of a statute renders all caselaw regarding all areas of the statute to be void. Nonetheless, based on my determination herein that the Board lacks jurisdiction over this appeal, I do not find it necessary to further address this issue.

complaint. AF, Tab 11. That complaint also did not identify the content of any disclosures but, rather, generally stated that "as a result of disclosing fraud, waste [and] mismanagement," she suffered retaliation by agency officials. *Id.* The appellant previously submitted copies of correspondence she provided to OSC. AF, Tab 9. In her letter of January 11, 2000, and its attachment,[7] as well as the other correspondence appellant drafted to OSC, the appellant discusses alleged improprieties in agency policies and procedures but she does not identify any specific protected disclosures that she made to any agency officials.[8] *Id.* Thus, I find that the appellant has failed

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[7] The appellant's attachment is a "timeline" which lists activity between her and agency officials. AF, Tab 9. It specifies discussions she had with agency officials regarding a "VDP Program" and other issues but it does not specify any alleged disclosures. *Id.* As noted above, discussion or disagreement with supervisors over job-related activities, especially those made to supervisors and not to authorities in a position to correct fraudulent or illegal activity, are not disclosures protected by the WPA. *See Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed Cir. 1998). I note that, in her submissions to the Board, the appellant provided a document she prepared which specifically lists the alleged protected disclosures she made. Many of them she characterizes as a disclosures of "fraud, gross mismanagement, and abuse of authority." AF, Tab 9, Exhibit 1. However, there is no showing that these allegations were raised to OSC as protected disclosures. More importantly, these alleged disclosures all occurred prior to the appellant's termination with the agency and, as discussed at length herein, are barred by the settlement agreement between the parties.

[8] I note that, in her attachment to this letter, on page 8, the appellant indicated that, on June 4, 1997, she withdrew her IG complaint, presumably containing some or all of the appellant's disclosures, in light of the settlement agreement. AF, Tab 9. It is not possible to determine from the appellant's submissions whether all of her disclosures were contained in her IG complaint, but, if so, that also could serve to deprive the Board of jurisdiction over this matter.

to establish that she met the exhaustion requirement found at 5 U.S.C. § 1214(a)(3).[9]

For all of the above reasons, I find that the appellant has failed to make the required showing that the Board has jurisdiction over this appeal and, consequently, that the appeal must be dismissed. Further, although she requested a hearing, the appellant has failed to make specific allegations of fact which, if proven, could establish a prima facie case of Board jurisdiction. *See Dumas*, 789 F.2d at 894; *Manning*, 742 F.2d at 1428; *Ferdon*, 60 M.S.P.R. at 325. Consequently, the appellant's request for a hearing is denied.[10]

DECISION

The appellant's request for corrective action is DISMISSED.

FOR THE BOARD:

/s/ Sherry A. Armstrong
SHERRY A. ARMSTRONG
Administrative Judge

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[9] As discussed at length herein, it is my determination that the Board lacks jurisdiction to review any allegations concerning employment issues which could have been brought prior to execution of her settlement agreement with the agency on June 3, 1997. However, even if the appellant's allegations concerning activities which occurred prior to execution of the settlement agreement were properly before the Board in an IRA appeal, the appellant has failed to present a prima facie case of Board jurisdiction because she failed to establish that she met the exhaustion requirement found at 5 U.S.C. § 1214(a)(3) for the same reasons as stated herein.

[10] The appellant's pending motions to seal the record and to compel discovery are hereby moot in light of this decision.

NOTICE TO APPELLANT

This initial decision will become final on AUG 10 2000, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

March 10, 2000

Ms. Jane S. Weaver
2001 N. Adams #436
Arlington, VA 22201

Re: OSC File No. MA-99-2026

Dear Ms. Weaver:

The purpose of this letter is to notify you that you have a right to seek corrective action from the Merit Systems Protection Board (MSPB). As we informed you in our closure letter of this date, we have terminated our inquiry into your allegations. Because you alleged that you were the victim of the prohibited personnel practice described in 5 U.S.C. § 2302(b)(8), commonly called reprisal for whistleblowing, you may have the following rights.

You may seek corrective action from the MSPB under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221 (individual right of action) for any personnel action taken or proposed to be taken against you because of a protected disclosure that was the subject of your complaint to this office. You may file a request for corrective action with the MSPB within 65 days after the date of this letter.

The Merit Systems Protection Board regulations concerning rights to file an individual right of action with the Board can be found at 5 C.F.R., parts 1201-1206 and 1209. If you choose to file such an appeal you should submit this letter to the Board as part of your appeal.

Sincerely,

/s/ Francisco J. Ruben
FRANCISCO J. RUBEN
Attorney, Complaints
Examining Unit

TITLE 5—UNITED STATES CODE

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

Section 1201. Appointment of members of the Merit Systems Protection Board

The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board.

No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

Note:

WHISTLEBLOWER PROTECTION; CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE

Section 2 of Pub. L. 101-12 provided that:

> "(a) Findings.—The Congress finds that—
>
> > "(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;

"(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

"(3) in passing the Civil Service Reform Act of 1978 (Pub. L. 95-454, see Tables for classification), Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) from reprisal.

"(b) Purpose.—The purpose of this Act (see Short Title of 1989 Amendment note above) is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—

"(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

"(2) establishing—

"(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

"(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

"(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration."

Section 1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that—

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall—

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;

(iii) the reasons for terminating the investigation; and

(iv) a response to any comments submitted under paragraph (1)(D).

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee,

former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel and—

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and (ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate. (iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or (ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(2)(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the

Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to betaken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) If the Board orders corrective action under this section, such corrective action may include—

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

Section 1221. Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the

Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and (ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former em[p]loyee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(h)(1) An employee, former employee, or appiicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

Section 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer or reassigment;

(v) a reinstatement;

(vi) a restoration;

(vii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination; and

(xi) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection(b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

. . .

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—. . .

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences - (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

CODE OF FEDERAL REGULATIONS, TITLE 5

PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING

Revised as of January 1, 2000

Subpart A—Jurisdiction and Definitions

Sec. 1209.1 Scope.

This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant's whistleblowing activities, and requests for stays of personnel actions allegedly based on whistleblowing.

Sec. 1209.2 Jurisdiction.

(a) Under 5 U.S.C. 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

(b) The Board exercises jurisdiction over:

(1) Individual right of action appeals. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in Sec. 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

Example: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because of his whistleblowing activities. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an individual right of action appeal.

(2) Otherwise appealable action appeals. These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3 (a)(1) through (a)(19).)

Example: Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513. Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C.1221(a), Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board

(3) Stays. Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's request, order an agency to suspend that action.

Sec. 1209.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals and stay requests governed by this part. The Board will apply the provisions of subpart H of part 1201 regarding awards of attorney fees and consequential damages under 5 U.S.C. 1221(g) to appeals governed by this part.

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

Sec. 1209.4 Definitions.

(a) Personnel action means, as to individuals and agencies covered by 5 U.S.C. 2302:

(1) An appointment;

(2) A promotion;

(3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;

(4) A detail, transfer, or reassignment;

(5) A reinstatement;

(6) A restoration;

(7) A reemployment;

(8) A performance evaluation under chapter 43 of title 5, United States Code;

(9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action;

(10) A decision to order psychiatric testing or examination; or

(11) Any other significant change in duties, responsibilities, or working conditions.

(b) Whistleblowing is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) Contributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.

(d) Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than "preponderance of the evidence" as defined in 5 CFR 1201.56(c)(2).

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

Subpart B—Appeals

Sec. 1209.5 Time of filing.

(a) Individual right of action appeals. The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the

Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed:

(1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or,

(2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action, at any time after the expiration of 120 days.

(b) Otherwise appealable action appeals. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to file the appeal directly with the Board. If the appellant seeks corrective action from the Special Counsel, the time limit for appealing is governed by paragraph (a) of this section. If the appellant appeals directly to the Board, the time limit for filing is governed by 5 CFR 1201.22(b).

(c) Appeals after a stay request. Where an appellant has filed a request for a stay with the Board without first filing an appeal of the action, the appeal must be filed within 30 days after the date the appellant receives the order ruling on the stay request. Failure to timely file the appeal will result in the termination of any stay that has been granted unless a good reason for the delay is shown.

[55 FR 28592, July 12, 1990, as amended at 59 FR 31110, June 17, 1994; 62 FR 59993, Nov. 6, 1997]

Sec. 1209.6 Content of appeal; right to hearing.

(a) Content. Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file an appeal. Appeals may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24 (a)(1) through (a)(9);

(2) Where the appellant first sought corrective action from the Special Counsel, evidence that the appeal is timely filed;

(3) The name(s) and position(s) held by the employee(s) who took the action(s), and a chronology of facts concerning the action(s);

(4) A description of the appellant's disclosure evidencing whistleblowing as defined in Sec. 1209.4(b) of this part; and

(5) Evidence or argument that:

(i) The appellant was or will be subject to a personnel action as defined in Sec. 1209.4(a) of this part, or that the agency has threatened to take or not to take such a personnel action, together with specific indications giving rise to the appellant's apprehensions; and

(ii) The personnel action was or will be based wholly or in part on the appellant's whistleblowing, as described in Sec. 1209.4(b) of this part.

(b) Right to hearing. An appellant has a right to a hearing.

(c) Timely request. The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

Sec. 1209.7 Burden and degree of proof.

(a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

(e) Recording and Disclosure of Proceedings.

. . .

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

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(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the

need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.